TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 201. 97

THE STEAMBOAT EMILIE, PLAINTIFF IN ERROR,

vs.

THOMAS CARNEY AND THOMAS C. STEVENS, PARTNERS AS CARNEY AND STEVENS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 18, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 291.

THE STEAMBOAT EMILIE, PLAINTIFF IN ERROR,

vs.

THOMAS CARNEY AND THOMAS C. STEVENS, PARTNERS AS CARNEY AND STEVENS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

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1 STATE OF KANSAS, *sct:*

Be it remembered that heretofore, to wit, on the 1st day of December, A. D. 1864, there was filed in the office of the clerk of the Supreme Court of the State of Kansas a petition in error on behalf of the steamboat Emilie, by its attorneys, Messrs. Carr and Pendery, and also a transcript of the record and proceedings of the First District Court of said State, sitting in and for the county of Leavenworth, of a certain cause therein, wherein Thomas Carney and Thomas C. Stevens, partners, as Carney & Stevens, were plaintiffs, and the steamboat Emilie defendant, which said petition in error and transcript are in words and figures as follows:

2 Supreme Court, in the State of Kansas.

Petition in error.

THE STEAMBOAT EMILY *vs.* THOMAS CARNEY & THOMAS C. Stevens, partners, as Carney and Stevens.	Petition in error.

The steamboat Emily aforesaid complains of the said Thomas Carney and Thomas C. Stevens, partners, as Carney & Stevens, for that at the November term of the First District Court sitting in and for the county of Leavenworth, State of Kansas, the said Carney and Stevens did recover a judgment against this complainant in a certain action then pending in said court, wherein the said Carney and Stevens were pl'ffs, and the said steamboat Emily was defendant, a copy of the record of the proceedings and judgment in which case is hereto attached marked "A," and the said steamboat "Emilie" herein avers that there is error in said proceedings, in this, viz:

1st. That the court erred in admitting illegal, improper and irrelevant testimony on the trial of said cause in behalf of the said Carney & Stevens.

3 2nd. The court erred in finding and rendering a judgment in favor of the plaintiffs when it should have rendered a judgment for the defendant.

3d. The court erred in law in rendering a judgment in said cause in favor of the plaintiffs.

4th. The court erred in rendering judgment in behalf of plaintiffs from the evidence in said cause.

5th. The court erred in rendering a judgment contrary to both the law and the evidence in behalf of said plaintiffs.

6th. The court erred in rendering a judgment in behalf of plaintiff and decreeing said judgment lien upon said steamboat Emilie for tackle, furniture, &c.

7th. The court erred in overruling the motion filed in said cause for a new trial.

The plaintiff in this cause therefore prays that said judgment and decree be reversed and declared void, and defendants restored
4 to all their rights in the premises.

Dec. 1st. 1864.

JAMES CARR,
J. L. PENDERY,
Att'ys for Pl'ff in Error.

"A."

THOMAS CARNEY AND THOMAS C. STEVENS, partners, as Carney and Stevens, plaintiffs in error,
vs.
THE STEAMBOAT EMILY, defendant in error. } No. 1037.

James Carr and J. L. Pendery, attorneys for defendant in error.
Thomas P. Fenlon and W. P. Gambell, att'ys for plaintiffs in error.

From First Dist. Court of Leavenworth county, Kansas.

Be it remembered that heretofore, to wit, on the 3d day of
5 August, A. D. 1864, Thomas Carney and Thomas C. Stevens, partners, as Carney & Stevens, by their attorneys, Messrs. Fenlon and Gambell, filed in the clerk's office of the First District Court of the State of Kansas, sitting in and for the county of Leavenworth, their petition, which is in words and figures following, to wit:

In the District Court of Leavenworth co.

Petition in District Court.

THOMAS CARNEY AND THOMAS C. STEVENS, partners, as Carney & Stevens,
vs.
THE STEAMBOAT "EMILIE." } Petition.

STATE OF KANSAS, *Leavenworth County:*

The said plaintiffs, Thomas Carney and Thomas C. Stevens, partners, as Carney & Stevens, complain of the said defendant, the Steamboat "Emilie," and allege that they, the said plaintiffs, on the 17th day of May, A. D. 1864, were partners as above stated, trading and doing business under the name, style and firm of Carney & Stevens; plaintiffs further allege that the steamboat "Emilie,"
6 the said def't, at the said date, being at the port of Leavenworth, in the State of Kansas, on the Missouri river, and designed on a voyage upon the said Missouri river, the said Missouri river being of the waters of the State of Kansas, the said plaintiffs being then and there the owners of twenty-three bales of cotton, of the value of twenty thousand dollars, made a contract with the said defendant whereby said defendant agreed to, in consideration

of certain freights to be paid, to convey the said cotton from the said port of Leavenworth to the port of New York, in the State of New York, and there to deliver the same in good order and condition unto Freeman and Almey, the unavoidable dangers of the river and fire only excepted, and that on the said day the said plaintiffs delivered to the said boat the said cotton in good order and condition, and received from the clerk of said boat a bill of lading therefor, a copy of which said bill of lading is hereto attached, marked "A," and made a part of this petition, and the said defendant received the said cotton then and there; plaintiffs further allege that

7 the said defendant was a steamboat at said date, found in and navigating the said Missouri river, and is so now found in said river and navigating the same within the limits of this State.

And the said defendant afterwards, to wit, on the said 17th day of May, A. D. 1864, departed on the said voyage with said cotton, but the said defendant not regarding its duty in that respect nor its promise and undertaking to convey and deliver the said cotton as aforesaid, did not so convey and deliver the same, (although no unavoidable dangers of the river or fire prevented it from so doing,) but on the contrary thereof, so negligently and carelessly conducted itself with respect to the said cotton, that by and through the mere carelessness, negligence and improper conduct of the said defendants and its officers, mariners and servants, the said cotton became and was wholly lost to these plaintiffs, by reason whereof the said pl'ffs have sustained damage to the amount of twenty thousand dollars.

Wherefore said plaintiffs pray judgment against the said defendant, its apparel, tackle, furniture and appendages for the said sum of twenty thousand dollars, with interest thereon at the legal rate,

8 from the 20th day of May, A. D. 1864, and that the same may be declared a lien upon said def't, its apparel, tackle, furniture and appendages, and that the same may be ordered and decreed to be sold according to law to satisfy said judgment.

THOMAS P. FENLON,
W. P. GAMBELL,
Plaintiffs' Att'ys.

Affidavit of Stevens.

THE STATE OF KANSAS, *Leavenworth County, ss:*

Thomas C. Stevens, of the above-named pl'ffs, being first duly sworn, according to law, doth depose and say, that the facts stated in the above petition are true.

THOMAS C. STEVENS.

Sworn to before me and subscribed in my presence this 3d day of August, A. D. 1864.

JOHN E. BLAINE, *Clerk.*

"A."

Bill of lading.

Thomas Carney & Co.,

Wholesale grocers and commission merchants.

Shipped in good order and well conditioned, by Carney &
9 Stevens, on board the good steamboat Emilie, the following articles, marked and numbered as below, which are to be delivered without delay in like good order at the port of New York, the unavoidable dangers of the river and fire only excepted, unto Freeman & Almey, or assigns, he or they paying freight for said goods at the rate of . Charges, $65 00.

In witness whereof the owner, agent, master, or clerk of said boat has affirmed to 4 bills of lading of this tenor and date, one of which being accomplished the others to stand void.

Dated at Leavenworth, Kansas, May 17th, 1864.

[Conservative print.]

Marks.	Articles.	Weight.
F. & A., New York.	23 bales cotton, poorly baled, torn and ragged.	10,837.

JOHN E. HANNA, JR.

Lot bought of Wilson, Gordon & Nay. Cotton account.

Endorsed on petition.

Which said petition bears the following endorsement, to wit:

Thomas Carney and Thomas C. Stevens, as Carney and
10 Stevens, vs. The Steamboat "Emilie." Petition, filed August 3d, 1864. John E. Blaine, clerk. Fenlon and Gambell.

And afterwards, to wit, on the 4th day of August, A. D. 1864, the following summons was issued, to wit:

Summons.

UNITED STATES OF AMERICA,

State of Kansas, First District, Leavenworth County:

The State of Kansas to the sheriff of Leavenworth county, in said State, greeting:

You are hereby commanded to notify the steamboat "Emilie" that it has been sued by Thomas Carney and Thomas C. Stevens, partners, doing business as Carney & Stevens, in the Dist. Court, sitting in and for said county of Leavenworth, and unless it answers by the third day of September, A. D. 1864, the petition of the said

Carney and Stevens against it, filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 14th day of August, A. D. 1864.

11 Witness my hand and the seal of said court, affixed at my office in the city of Leavenworth, this the 14th day of August, 1864.

[SEAL.] JOHN E. BLAINE, *Clerk*,
By J. K. WHITEHEAD, *D. C.*

[U. S rev. st., 50 c.. cancelled.]

Endorsed on summons.

Upon the back of which summons is the following endorsement, to wit: Suit brought for the recovery of money. Amount claimed $20,000, with interest from the 20th day of May, 1864, at the rate of seven per cent. per annum. Thomas P. Fenlon & W. P. Gambell, attorneys for plaintiff.

And also is the following endorsed thereon, to wit: 3, page 61, No. 1,037, District Court, Leavenworth county, Kansas. Carney and Stevens vs. The Steamboat "Emilie." Issued August 4, 1864. Returnable August 14, 1864. Fenlon and Gambell, plaintiff's attorneys. Filed Aug. 13th, 1864. John E. Blaine, clerk. By J. R. Whitehead, D. C.

The following is the return of the sheriff of Leavenworth county, Kansas, thereon, to wit:

Sheriff's return.

Received this summons August 4, 1864, at 10 o'clock a. m.,
12 and served the same Aug. 13th, A. D. 1864, by delivering personally, in my county, a true copy to the captain of the steamboat Emilie.

JOHN McKEE, *Sheriff.*

Fees.

Serving	75c.
Mileage	25c.
	$1 00

And afterwards, and on the same day, to wit, the 4th day of August, A. D. 1864, the following writ of seizure was issued, to wit:

In the District Court of the State of Kansas, sitting within and for Leavenworth county.

Writ of seizure.

THOMAS CARNEY AND THOMAS C. STEVENS, partners, as Carney and Stevens, *vs.* THE STEAMBOAT "EMILIE." } No.

UNITED STATES OF AMERICA,
State of Kansas, Leavenworth County, ss:

The State of Kansas to the sheriff of Leavenworth county, greeting:

You are hereby commanded to seize the steamboat Emilie, its apparel, tackle, furniture and appendages, and detain the same until released by due course of law.

13 Witnesses: John E. Blaine, clerk of said court, with the seal thereof affixed, at office, in the city of Leavenworth, this 4th day of August, A. D. 1864.

[SEAL.] JOHN E. BLAINE, *Clerk*,
By J. K. WHITEHEAD, *D. C.*

Upon which is the following return of the sheriff, to wit:

Sheriff's return.

Received this writ August 4th, A. D. 1864, at ten o'clock a. m., and return the same unexecuted this 13th day of Aug., A. D. 1864, at request of plaintiffs.

Fees, $1.00.

JOHN McKEE, *Sheriff.*

Which said writ is endorsed as follows, to wit:

3—61. No. 1037. Carney and Stevens vs. The Steamboat "Emilie." Writ of seizure. Issued August 4th, 1864. Ret. Aug. 14th, 1864. Filed August 13th, 1864. John E. Blaine, clerk. By J. K. Whitehead, D. C. Fenlon & Gambell, attorneys for plaintiffs.

14 Be it remembered that at a session of the District Court of the first judicial dist. of the State of Kansas, sitting in and for Leavenworth county, begun and held in the city of Leavenworth, commencing on Monday, the 5th day of September, A. D. 1864—present, the Hon. W. C. McDowell, judge; John McKee, sheriff, and John E. Blaine, clerk—the following appears of record, to wit:

Journal entry, book 4, *page* 396.

FRIDAY, *September* 23*d*, 1864.

THOMAS CARNEY AND THOMAS C. STEVENS, as Carney & Stevens, *vs.* THE STEAMBOAT "EMILIE." } No. 1037.

With the consent of the counsel, it is ordered by the court that this cause stand continued until the next term hereof. And afterwards, on the 18th day of November, A. D. 1864, the defendant, by its attorneys, Messrs. Pendery & Carr, filed their answer herein, leave of court being had, which is as follows, to wit:

In the First Dist. Court in and for Leavenworth county.

Answer.

THOMAS CARNEY AND THOMAS C. Stevens, pl'ffs, *vs.* STEAMBOAT EMILIE, defendant. } Answer.

STATE OF KANSAS, *Leavenworth County*:

The defendant for answer to the plaintiffs' petition filed in this cause admits that she entered into a contract with the plaintiffs to transport a lot of cotton as alleged in said petition; that she received said cotton at the port of Leavenworth, in the State of Kansas, and says she transported the same from said port of Leavenworth to port of Weston, in the State of Missouri, the end of her voyage, (she only plying between said ports,) when she delivered said cotton in like good order as she received it to the Platte County Railroad Company, the road of said company being on the said route between the port of Leavenworth and the city of New York, the point of destination of said cotton.

This defendant denies that she did negligently and carelessly conduct herself with respect to the said cotton, and that by her negligence, carelessness or improper conduct, or that of her offi-
16 cers, mariners or servants, the said cotton was wholly or in part destroyed or lost to plaintiffs.

This defendant further states that whilst said cotton was in transit from the port of Weston, in the State of Missouri, to the city of St. Joseph, in said State, and in the possession and under the control of the Platte County Railroad Company, said cotton was destroyed by fire, without any negligence, carelessness or improper conduct on the part of this defendant, her officers, mariners or servants.

Whereupon this defendant avers that by means of the premises she is not liable for the loss of said cotton or any part thereof, and prays to be dismissed with her costs.

JAMES CARR & J. L. PENDERY,
Att'ys for Def'ts.

And afterwards, and on the same day, to wit, the 4th day of August, A. D. 1864, the following writ of seizure was issued, to wit:

In the District Court of the State of Kansas, sitting within and for Leavenworth county.

Writ of seizure.

THOMAS CARNEY AND THOMAS C. STEVENS, partners, as Carney and Stevens, *vs.* THE STEAMBOAT "EMILIE." } No.

UNITED STATES OF AMERICA,
State of Kansas, Leavenworth County, ss:

The State of Kansas to the sheriff of Leavenworth county, greeting:

You are hereby commanded to seize the steamboat Emilie, its apparel, tackle, furniture and appendages, and detain the same until released by due course of law.

13 Witnesses: John E. Blaine, clerk of said court, with the seal thereof affixed, at office, in the city of Leavenworth, this 4th day of August, A. D. 1864.

[SEAL.] JOHN E. BLAINE, *Clerk*,
By J. K. WHITEHEAD, *D. C.*

Upon which is the following return of the sheriff, to wit:

Sheriff's return.

Received this writ August 4th, A. D. 1864, at ten o'clock a. m., and return the same unexecuted this 13th day of Aug., A. D. 1864, at request of plaintiffs.

Fees, $1.00.

JOHN McKEE, *Sheriff.*

Which said writ is endorsed as follows, to wit:

3—61. No. 1037. Carney and Stevens vs. The Steamboat "Emilie." Writ of seizure. Issued August 4th, 1864. Ret. Aug. 14th, 1864. Filed August 13th, 1864. John E. Blaine, clerk. By J. K. Whitehead, D. C. Fenlon & Gambell, attorneys for plaintiffs.

14 Be it remembered that at a session of the District Court of the first judicial dist. of the State of Kansas, sitting in and for Leavenworth county, begun and held in the city of Leavenworth, commencing on Monday, the 5th day of September, A. D. 1864—present, the Hon. W. C. McDowell, judge; John McKee, sheriff, and John E. Blaine, clerk—the following appears of record, to wit:

Journal entry, book 4, *page* 396.

FRIDAY, *September* 23*d*, 1864.

THOMAS CARNEY AND THOMAS C. STEVENS, as Carney & Stevens, *vs.* THE STEAMBOAT "EMILIE." } No. 1037.

With the consent of the counsel, it is ordered by the court that this cause stand continued until the next term hereof. And afterwards, on the 18th day of November, A. D. 1864, the defendant, by its attorneys, Messrs. Pendery & Carr, filed their answer herein, leave of court being had, which is as follows, to wit:

In the First Dist. Court in and for Leavenworth county.

Answer.

THOMAS CARNEY AND THOMAS C. Stevens, pl'ffs, *vs.* STEAMBOAT EMILIE, defendant. } Answer.

STATE OF KANSAS, *Leavenworth County*:

The defendant for answer to the plaintiffs' petition filed in this cause admits that she entered into a contract with the plaintiffs to transport a lot of cotton as alleged in said petition; that she received said cotton at the port of Leavenworth, in the State of Kansas, and says she transported the same from said port of Leavenworth to port of Weston, in the State of Missouri, the end of her voyage, (she only plying between said ports,) when she delivered said cotton in like good order as she received it to the Platte County Railroad Company, the road of said company being on the said route between the port of Leavenworth and the city of New York, the point of destination of said cotton.

This defendant denies that she did negligently and carelessly conduct herself with respect to the said cotton, and that by her negligence, carelessness or improper conduct, or that of her offi-
16 cers, mariners or servants, the said cotton was wholly or in part destroyed or lost to plaintiffs.

This defendant further states that whilst said cotton was in transit from the port of Weston, in the State of Missouri, to the city of St. Joseph, in said State, and in the possession and under the control of the Platte County Railroad Company, said cotton was destroyed by fire, without any negligence, carelessness or improper conduct on the part of this defendant, her officers, mariners or servants.

Whereupon this defendant avers that by means of the premises she is not liable for the loss of said cotton or any part thereof, and prays to be dismissed with her costs.

JAMES CARR & J. L. PENDERY,
Att'ys for Def'ts.

Endorsed.

Which said answer is endorsed as follows, to wit:

Carney and Stevens v. Steamboat "Emilie." Answer, filed Nov. 18th, 1864. John E. Blaine, clerk. By J. K. Whitehead, D. C. James Carr and J. L. Pendery, att'ys for defendant.

And afterwards, on the 18th day of November, A. D. 1864,
17 reply to the foregoing answer was filed, to wit:

In the Dist. Court for Leavenworth county.

Reply.

THOMAS CARNEY *et al.*
vs.
STEAMBOAT "EMILIE." } Reply.

For reply to the answer of the said defendant the plaintiffs deny each and every allegation therein contained.

THOMAS P. FENLON,
W. P. GAMBELL,
Pl'ffs' Attorneys.

Endorsed.

Upon which is endorsed the following, to wit: Carney and Stevens *vs.* The Steamboat "Emilie." Reply. Filed Nov. 18, 1864. John E. Blaine, clerk. By J. K. Whitehead, D. C.

Journal entry, book 4, *page* 450.

And afterwards, at the November term of the court aforesaid, officers present as before, the following proceedings were had, to wit:

FRIDAY, *Nov.* 18*th*, 1864.

THOMAS CARNEY AND THOMAS C. Stevens, partners, as Carney & Stevens,
vs.
THE STEAMBOAT "EMILIE." } No. 1037.

18 *Judgment of District Court.*

Now comes the said parties to this action, by their respective attorneys, and leave of the court first being had and obtained, the said def't, by Messrs. Pendry & Carr, esq'rs, file its answer herein, and the said plaintiffs, with the like permission, doth, by

Mess. Fenlon and Gambell file their reply to the said def't's answer; and neither party requiring a jury, this cause is submitted to the court for trial. And the court having heard the evidence adduced and the arguments of counsel, and being well advised in the premises, finds for the plaintiffs, and assesses their damages sustained by reason of the premises, and finds the amount to be the sum of fifteen thousand two hundred eighty-six 70-100 dollars.

It is therefore considered by the court that the said plaintiffs, as Carney & Stevens, have and recover from the steamboat "Emilie" the said sum of fifteen thousand two hundred and eighty-six 70-100 dollars, as well as all costs in and about this suit expended, and that they have hereof execution.

And the court doth further adjudge and decree that this judgment is a lien upon the said def't, the steamboat "Emelie," its apparel, tackle, furniture and appendages, and that the said steamboat
19 "Emilie," its apparel, tackle, furniture and appendages are liable for the payment of said sum so found due as aforesaid; and it is further ordered, adjudged and decreed that unless the said defendant shall within ten days from this date pay into court for the use of these plaintiffs the said sum of money so found due as aforesaid, together with costs of suit and accruing interest, then that an order issue out of this court, directed to the sheriff of the county of Leavenworth, commanding him to advertise and sell the said boat, its apparel, tackle, furniture and appendages in the manner provided by law for the sale of personal property on execution; that out of the proceeds of such sale he pay first the cost of this suit, second the amount so found due as aforesaid, with accruing interest, and that the balance, if any, he bring into court to abide its further order.

Exception to judgment.

To judgment and order the defendant, by its counsel aforesaid, excepts.

And afterwards, to wit, on the 21st day of November, A. D. 1864, the defendant herein, by her attorneys aforesaid, filed her motion for a new trial, which is in words and figures following, to wit:

20 *Motion for a new trial.*

THOMAS CARNEY AND THOMAS C. STEVENS, pl'ffs, *vs.* THE STEAMBOAT "EMILIE," defendants.	Motion for new trial.

In the First Dist. Court sitting in and for Leavenworth county, defendant comes by her attorneys and moves the court to set aside its finding in the above-entitled cause and the judgment rendered thereon, and grant a new trial, for the following reasons:

1st. Because the court admitted illegal, improper and irrelevant testimony on the trial on behalf of the plaintiffs.

2nd. Because the court found and rendered judgment for the plaintiffs when it should have found and rendered judgment for the defendant.

3d. Because the court found and rendered judgment contrary to the evidence.

4th. Because the court found and rendered judgment contrary to law.

5th. Because the court found and rendered judgment contrary to both law and evidence.

JAMES CARR, and
J. L. PENDERY,
Att'ys for Def't

21 *Endorsed.*

Which said motion bears the following endorsement, to wit: Carney & Stevens vs. Steamboat Emilie. Motion to set aside finding and judgment, and grant a new trial. Filed Nov. 21st, 1864. John E. Blaine, clerk. By J. E. Arnold, D. C.

And afterwards and at the same time of the court aforesaid, to wit, the November term, A. D. 1864, officers present as before, the following proceedings were had, to wit:

Journal entry, book 4, *p.* 469.

WEDNESDAY, *November* 23*d*, 1864.

THOMAS CARNEY AND THOMAS C. STEVENS, partners, as Carney & Stevens,
vs.
THE STEAMBOAT EMILY. } No. 1037.

Motion for new trial overruled.

The motion for a new trial in this cause being argued by counsel, is overruled by the court; to which ruling of the court def't, by its counsel, excepts and tenders to the court here the bill of exceptions herein, which is now here signed and sealed by the Hon. W. C. McDowell, judge, and by the court allowed and ordered to
22 be made a part of the record of this cause, which is accordingly done.

And the defendant did then and there, and on the 23d day of November, A. D. 1864, file herein her bill of exceptions, which is as follows, to wit:

In the Dist. Court sitting in and for Leavenworth county.

Bill of exceptions.

THOMAS CARNEY AND THOMAS C. STEVENS, partners, as Carney & Stevens, plaintiffs,
vs.
THE STEAMBOAT EMILIE, defendant.

STATE OF KANSAS, *Leavenworth County, ss*:

Be it remembered, that on this 18th day of November, 1864, the above-entitled cause came on to be tried on the plaintiffs' petition, the def'ts answer and the replication thereof. The pl'ffs, to support their cause of action, read in evidence the following agreed statement of facts:

23 In the District Court sitting in and for the county of Leavenworth.

Agreed statement of facts.

THOMAS CARNEY AND THOMAS C. STEVENS, partners, as Carney & Stevens,
v.
THE STEAMBOAT EMILIE.

THE STATE OF KANSAS, *Leavenworth County, ss*:

The above-named parties without action agree upon the following fact, upon which the controversy between them depends, and submit the same to the Dist. Court of Leavenworth county for its decision and judgment:

1st. It is admitted that Thomas Carney and Thomas C. Stevens were partners, as Carney & Stevens, on the 17th day of May, A. D. 1864, and at the date of this submission.

2nd. That on that day they made a contract with defendant to convey 23 bales, weighing 10,837 lbs., of cotton, from Leavenworth City, in Kansas, to New York city, in the State of New York, and to deliver the same to Freeman & Almey, at that city; that the receipt hereto attached, marked "A," was given by said defendant
24 to the pl'ffs on the day of the delivery of said cotton by plaintiffs to defendant.

3d. That said cotton was delivered by plaintiffs to defendant on the 17th day of May, 1864, and received by defendant in good order and condition on said day.

4th. That the cotton was taken by the said defendant from the port of Leavenworth, and delivered by the said def't to the agents of the Platte County R. R. at Weston, Mo.; that the cotton took fire on the railroad between Weston and St. Joseph, and was partially

consumed before the train conveying it arrived at St. Joseph. The part not consumed was then taken from the cars and spread out on the ground by the agents of the Platte Co. R. R., and whilst there took fire and was entirely consumed; this on the 20th day of May, 1864; neither of which fires occurred or were caused by the plaintiffs or their agents, nor by the enemies of the country, and occurred whilst in transit and in the possession and under the control of the parties to whom the cotton had been delivered by the said defendant.

5th. That the defendant was a steamboat found on the
25 waters of this State, and doing business on the same at the date of the contract aforesaid and at the date of this agreement and submission.

6th. It is further agreed that the plaintiffs, Carney and Stevens, shall, in addition to these agreed facts, introduce legal evidence to show the quality of the cotton and the value thereof at such place and time as it may be competent and proper in law to show the same, and such evidence when received shall constitute a part of these agreed facts.

7th. That if the judgment in the case be not appealed from within 30 days from its rendition, the amount thereof shall be paid by the losing party.

CARNEY & STEVENS.
SAM'L BANKS,
Captain of Steamer Emilie.

In the above submitted case it is agreed that the plaintiffs may take depositions and read the same without objection, except as to competency or relevancy.

SAMUEL BANKS,
Captain Steamer Emilie.

Bill of lading, reference to.

For the exhibit "A" refered to in the 2nd paragraph of this agreed statement of facts, see pages 8 and 9 of this transcript.

Endorsed.

26 The following is the endorsement on the foregoing statement of facts:

Carney and Stevens vs. The Steamboat "Emilie." Filed Aug. 10th, 1864. John E. Blaine, clerk, by J. K. Whiteheat, D. C.

Stevens' testimony.

The pl'ffs then introduced Thomas C. Stevens, who, being duly sworn, testified as follows:

I know the cotton in question; it was good middling Upland Arkansas cotton. It takes about 30 days to ship goods from Leaven-

worth to New York. The cotton was shipped on the 17th day of May, 1864. It sometimes takes 40 days to ship goods from this to New York. I would say that it ordinarily takes about forty days to ship goods.

Cross-examined.

I am one of the plaintiffs. I know this was middling Upland Arkansas cotton. I have acted as clerk on a steamboat which runs up the Arkansas and Red rivers, and shipped cotton to New Orleans in 1852, and acting as clerk in a commission and forwarding house partially engaged in the cotton trade in New Orleans. I sampled all this cotton, and consider myself a good judge of the quality of cotton and of this cotton.

It was admitted by the pl'ffs that the $65 charges men-
27 tioned in the bill of lading were back charges which had accrued on said cotton, and was paid by the def't to the plaintiffs when said cotton was delivered to defendants.

The plaintiff then read the following deposition in evidence:

STATE OF KANSAS, *County of Leavenworth:*

In the District Court of the State of Kansas, sitting in the county of Leavenworth, for the trial of causes arising under the laws of said State.

THOMAS CARNEY and THOMAS C. STEVENS, partners, as Carney & Stevens, plaintiffs,
vs.
THE STEAMBOAT EMILIE.

STATE OF NEW YORK,
City and County of New York, ss:

Deposition of sundry witnesses taken before me, Joseph P. Nones, commissioner of the State of Kansas, within and for the county and State of New York, at my office, No. 262 Broadway,
28 corner of Warren street, in said city and county of New York, on the 25th and 26th days of August, A. D. 1864, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said days, pursuant to the annexed notice, to be read in evidence on behalf of the said plaintiffs in said action.

Anthony Forbes Freeman, of lawful age, being by me first duly examined, cautioned and solemnly sworn, deposeth as follows, viz:

Anthony F. Freeman's deposition.

Ques. 1. Please state your name, age and occupation, residence and place of business.

Ans. 1. My name is Anth'y Forbes Freeman; my age is 24; my

occcupation is commission merchant; I reside at 175 W. 11th street, N. York; and I do business at 55 Front street, New York.

Ques. 2. How long have you been engaged in said business?

Ans. 2. Sixteen months.

Ques. 3. Do you or not know the market value of middling Upland Arkansas cotton in New York city between the 20th day of May, 1864, and the 4th day of July, 1864? If so, please state the same.

Ans. 3. I do; New Orleans middling ranks the same as middling Arkansas cotton, and is known as the same in the New York market.

Ques. 4. State specifically said market price between said
29 dates.

Ans. 4. I do so by handing a paper on the subject as my testimony, which the commissioner annexes hereto as exhibit A, fully answering the question.

Ques. 5. Have you any interest in the result of this action?

Ans. 5. None at all.

New York, Aug. 25th, 1864.

A. F. FREEMAN.

[5-c. rev. stamp cancelled.]

Exhibit A.

Middling Upland Arkansas cotton is known in this market as about equal in value to New Orleans middling; the prices on each day from the 20th May to July 4th are as follows:

May	20,	89c.	90.	June	15,	127c. 129.
"	21,	90c.	91.	"	16,	139c. 140.
"	23,	92c.	93.	"	17,	150c.
"	24,	95c.		"	18,	149c. 150.
"	25,	97c.	98.	"	20,	150c.
"	26,	100c.	101.	"	21,	150c.
"	27,	101c.	102.	"	22,	147c. 148.
"	28,	102c.	103.	"	23,	147c.
"	30,	104c.		"	24,	145c. 146.
30 "	31,	107c.	108.	"	25,	145c.
Jun.	1,	108c.		"	27,	145c.
"	2,	107c.	108.	"	28,	145c.
"	3,	107c.		"	29,	145c. 146.
"	4,	106c.	107.	"	30,	147c.
"	6,	107c.		July	1,	148c. 149.
"	7,	106c.	107.	"	2,	154c.
"	8,	107c.	108.	"	5,	154c.
"	9,	110c.	111.			
"	10,	113c.	114.			
"	11,	118c.				
"	13,	127c.	128.			
"	14,	126c.	128.			

Endorsed: Exhibit "A." J. B. Nones, comm'r. A. F. Freeman. David E. Green. Wm. Almey.

When the plaintiffs came to the third question and answer, the defendant objected to the reading thereof in evidence for the following reasons:

1st. Because said question and answer are not relevant to the issue. 2nd. Because the market value of cotton at the point of shipping the same, viz., at Leavenworth, Kansas, and not at the point of destination, viz., in New York city, is the proper point for ascertaining and fixing the value of the cotton in controversy, and furnished the true measure of damages. 3d. Because the proper point
31 for ascertaining and fixing the value of said cotton is the place where said cotton was burnt, viz., at Weston and St. Joseph, Mo. Which objection the court overruled and allowed the plaintiffs to read said question and answer in evidence, to which ruling of the court the def't at the time excepted. The def't objected the plaintiffs reading the fourth question and answer in evidence for the same reasons, which objection the court overruled and allowed the plaintiffs to read said question and answer in evidence; to which ruling of the court the def't at the time excepted. The def't likewise objected to the same questions and answers in the depositions of David E. Green and Wm. F. Almey being read in evidence, and for the same reasons as specified above in regard to the reading of the 3d and 4th questions and answers in the deposition of Anthony F. Freeman, which objections the court overruled and allowed the plaintiffs to read questions and answers in evidence, to which ruling of the court the defendant at the time excepted.

Deposition of David E. Green.

David E. Green, of lawful age, being by me first duly examined, cautioned and solemnly sworn, deposeth as follows, viz:

32 Ques. 1. State your name, age and occupation, place of residence and business, and the length of time you have been in such business.

Ans. My name is David E. Green; my age is 27 years; my occupation cotton broker. I reside Fort Green Place, No. 145 Brooklyn, N. Y., and do business at 132 Perst st., N. Y. city; have been 4 years in such business.

Ques. 2. Do you know the market value of middling Upland Arkansas cotton in New York city, between the 20th of May, 1864, and 4 of July, 1864?

Ans. I do.

Ques. 3. State specifically said market value at all dates between said dates, and examine annexed exhibit A, and say what you know of it.

Ans. I have examined exhibit A, annexed particularly, and I adopt the said statement as correct and as a part of my testimony in this case; the prices therein set forth from time to time, and within

said days enquired about, are correctly set forth to the best of my knowledge and belief, and I feel fully competent to judge.

Ques. 4. Have you any interest in this suit?

Ans. I have none.

DAVID E. GREEN.

[5-ct. stamp, canceled.]

33 William F. Almey, of lawful age, being by me first duly examined, cautioned and solemnly sworn, deposeth as follows, viz:

Deposition of W. F. Almey.

Ques. 1. Please state your name, age and occupation.

Ans. My name is Wm. F. Almey; my age is 23 years; my occupation, commission merchant.

Ques. 2. Where do you reside and do business, and how long have you been engaged in such business?

Ans. I reside in 152nd st., N. Y. city.

Ques. 3. Do you or not know the market price of middling Upland Arkansas cotton in New York city between the 20th day of May, 1864, and the 4th day of July, 1864? Please examine exhibit "A" annexed, and say if it is not correct.

Ans. I do, and state the annexed exhibit "A" to be entirely correct and true to the best of my knowledge and belief.

Ques. 4. State specifically said market value at all dates between said dates.

Ans. I reiterate the prices named in the annexed exhibit "A," and adopt it as my answer to questions 3 and 4.

Ques. Have you any interest in the result of this action?

I have not any.

WM. F. ALMEY.

J. K. NONES, *Com'r.*

[5-c. rev. stamp cancelled.]

34 The case was then, after the argument of counsel, submitted to the court, who found for the plaintiffs, and rendered judgment for the sum of $15,286 70.

The defendant then filed the following motion to set aside said finding and judgment rendered thereon, and grant a new trial, (see page 17 of this transcript,) which motion the court after hearing and being fully advised of concerning the same, overruled.

To the overruling of which the defendant at the time excepted.

Thereupon the defendant tendered this her bill of exceptions, and prays the court to sign, seal and allow, and make the same a part of the record in this cause, which is done accordingly.

[SEAL.] W. G. McDOWELL, *Judge.*

Endorsed.

Which said bill of exceptions bears the following endorsement, to wit:

Carney & Stevens vs. Steamboat "Emilie." Bill of exceptions. Filed Nov. 23d, 1864. John E. Blaine, clerk. By J. E. Arnold, D. C.

Supreme Court of the United States.

December Term, A. D. 1869.

THE STEAMBOAT EMILIE, Plaintiff in Error, *vs.* THOMAS CARNEY AND THOMAS C. STEVENS, Partners as Carney & Steaens, Defendants in error.	Error to Supreme Court of Kansas.

STATEMENT OF THE CASE.

On the 3d day of August, A. D. 1864, the defendants in error commenced suit in the District Court of Leavenworth county, Kansas, against the steamboat Emilie, plaintiff in error, to recover damages to the amount of $20,000, for an alleged breach of a contract of affreightment entered into between said parties on the 17th day of May, A. D. 1864, by which the steamboat Emilie agreed to convey 23 bales of cotton from the port of Leavenworth, in the State of Kansas, to the port of New York, in the State of New York, and there to deliver the same in good order and condition unto Freeman and Abney, the unavoidable dangers of the river and fire only excepted. In their petition the defendants in error alleged that the plaintiff in error was a steamboat at said date, found in and navigating the Missouri river, and at the time of commencing said suit was so found in said river and navigating the same within the limits of said State.

That by and through the mere carelessness, negligence, and improper conduct of the plaintiff in error, her officers, mariners and servants, the said cotton was wholly lost to the defendant in error. Wherefore they pray judgment against

the said plaintiff in error, her apparel, tackle, furniture and appendages for the sum of $20,000, with interest thereon from the 20th day of May, A. D. 1864, and that the same may be declared a lien upon the said steamboat, her apparel, tackle, furniture and appendages, and that the same may be ordered and decreed to be sold according to law to satisfy said judgment.

On the 4th day of August, 1864, a writ was issued to the sheriff of Leavenworth county, Kansas, commanding him to seize the steamboat Emilie, her apparel, tackle, furniture and appendages, and detain the same until released by due course of law. This writ was returned by the sheriff, executed on the 13th day of August, A. D. 1864.

The plaintiff in error appeared by her attorneys on the 18th day of November, 1864, and filed an answer admitting that she had entered into said contract at the time and place alleged in said petition, and alleged that she had transported the same from said port of Leavenworth to the port of Weston, in the State of Missouri, the end of her voyage, (she only plying between said ports,) where she delivered said cotton, in like good order as she received it, to the Platte County Railroad Company, the road of said company being on the route between the port of Leavenworth and the city of New York, the point of destination. That when said cotton was in transit from the port of Weston, in the State of Missouri, to the city of St. Joseph in said State, and in the possession and under the control of the Platte County Railroad Company, said cotton was destroyed by fire, without any negligence, carelessness, or improper conduct on the part of the plaintiff in error, her officers, mariners, or servants.

The defendants in error filed a replication to this answer denying each and every allegation therein contained.

On the 18th day of November, A. D. 1864, this cause was tried on the following *agreed statement of facts*, in pursuance of section 507, chapter 26, p. 212, of the Compiled Laws of Kansas.

"The above-named parties, without action, agree upon the following facts upon which the controversy between them depends, and submit the same to the District Court of Leavenworth county for its decision and judgment:

1st. It is admitted that Thomas Carney and Thomas C. Stevens were partners, as Carney & Stevens, on the 17th day of May, A. D. 1864, and at the date of this submission.

2d. That on that day they made a contract with defendant to convey 23 bales, weighing 10,837 lbs., of cotton, from Leavenworth city, in Kansas, to New York city, in the State of New York, and to deliver the same to Freeman & Almey, at that city; that the receipt hereto attached, marked "A," was given by said defendant to the plaintiffs on the day of the delivery of said cotton by plaintiff to defendant.

3d. That said cotton was delivered by plaintiffs to defendant on the 18th day of May, A. D. 1864, and received by defendant in good order and condition on said day.

4th. That the cotton was taken by the said defendant from the port of Leavenworth and delivered by the said defendant to the agents of the Platte County railroad at Weston, Missouri; that the cotton took fire on the railroad between Weston and St. Joseph. The part not consumed was then taken from the cars and spread out on the ground by the agents of the Platte Co. R. R., and whilst there, took fire and was entirely consumed; this on the 20th day of May, 1864; neither of which fires occurred or were caused by the plaintiffs or their agents, nor by the enemies of the country, and occurred whilst in transit and in the possession and under the control of the parties to whom the cotton had been delivered by the said defendant.

5th. That the defendant was a steamboat found on the waters of this State, and doing business on the same at the date of the contract aforesaid, and at the date of this agreement and submission.

6th. It is further agreed that the plaintiffs, Carney & Stevens, shall, in addition to these agreed facts, introduce evidence to show the quality of the cotton and the value

thereof, at such place and time as it may be competent and proper in law to show the same, and such evidence when received shall constitute a part of these agreed facts.

7th. That if the judgment in the case be not appealed from within 30 days from its rendition, the amount thereof shall be paid by the losing party.

CARNEY & STEVENS.
SAM'L BURKS,
Capt. of Steamer Emilie."

On this agreed statement of facts said District Court of Leavenworth county, Kansas, rendered judgment against the plaintiff in error, her apparel, tackle, furniture, and appendages, for the sum of $15,286.70, and the sheriff of Leavenworth county was commanded to advertise and sell the plaintiff in error, her apparel, tackle, furniture, and appendages in the manner provided by law for the sale of personal property on execution.

The plaintiff in error took this case by petition in error to the Supreme Court of Kansas, by which the judgment of said District Court of Leavenworth county was affirmed at the January term, A. D. 1865, of said Supreme Court. This case was then brought to this court by writ of error issued on the 20th day of June, A. D. 1868, under the 25th section of the Judiciary Act.

On the 25th day of November, 1869, the defendants in error filed the following motion to dismiss said writ of error:

The, the defendants in error move the court to dismiss this writ of error for want of jurisdiction.

It does not appear from the record thrt any question arose or was decided in the supreme court of the State which this court can review under any head of its legal jurisdiction.

No right was claimed there by the defendant in error.

The following is the act of the Legislature of Kansas upon which this suit and the proceedings therein took place:

AN ACT regulating Actions against Boats..

Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas:

SECTION 1. Any boat found in the waters of this Territory

is liable: *First*, For all debts contracted by the master, owner, agent, clerk, or consignee thereof, on account of supplies furnished for the use of such boat, on account of work or service rendered for such boat, or on account of work done, or materials furnished, in building, repairing, fitting out, furnishing, or equipping such boat. *Second*, For all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment, or any contract relative to the transportation of persons or property, entered into by the master, owner, agent, clerk, or consignee thereof. *Third*, For all injuries to persons or property by such boat, or by the officers or crew, done in connection with the business of said boat.

SEC. 2. Claims growing out of any of the above causes are liens upon the boat, its apparel, tackle, furniture, and appendages, including barges and lighters, if owned by the owners of the boat, and used therewith at the time the suit is commenced.

SEC. 3. Such liens take preference of any claims against the boat itself, or any or all of its owners, growing out of any other causes than those above enumerated: and, as between themselves, they are to be preferred in the following order: *First*, Those resulting from wages for services rendered on board of such boat, within the year then passed: *Provided*, suit be commenced within sixty days after the cessation of such labor. *Second*, Those resulting from contracts made within this Territory. *Third*, all other causes.

SEC. 4. Actions against boats, under the provisions of this chapter, can not be brought after the lapse of one year from the time the cause of action accrued.

SEC. 5. The lien attaches from the commencement of the suit, subject only to such other liens as are of a preferred class.

SEC. 6. The original petition must be in writing, sworn to, and filed with the clerk or justice of the peace, who shall thereupon issue a warrant to the proper officer, commanding him to seize the boat, its apparel, tackle, furniture, and appendages, and detain the same until released by due course of law.

SEC. 7. The usual summons or notice shall also be issued, directed to the boat by name, and served upon the master, owner, agent, clerk, or consignee thereof; and if none of them can be found, it may be served by posting up a copy in some conspicuous part of the boat. The warrant shall be served according to the direction it contains.

SEC. 8. Any person interested in the boat may appear for the defendant, by himself, his agent, or attorney, and conduct the defense of the suit; and no continuance shall be granted to the plaintiff while the boat is held in custody.

SEC. 9. The boat may be discharged, at any time before final judgment, by the giving of a bond, with sureties, to be approved by the officer serving the warrant, or by the clerk or justice who issued it, in a penalty double the plaintiff's demand, conditioned that the obligors therein will pay the amount which may be found due to the plaintiff, together with costs.

SEC. 10. If judgment be rendered for the plaintiff before the boat is thus discharged, a special execution shall be issued against it. If it have been previously discharged, the execution shall issue against the principal and sureties in the bond, without further proceedings.

SEC. 11. The sheriff may sell any of the furniture or appendages of the boat, if by so doing he can satisfy the demand. If he sell the boat itself, he must sell it to the bidder who will advance the amount required to satisfy the execution for the lowest fractional share of the boat, unless the person appearing for the boat desire a different and equally convenient mode of sale.

SEC. 12. If a fractional share of the boat be thus sold, the purchaser shall hold such share or interest jointly with the other owners.

SEC. 13. If an appeal be taken by the defendant before the boat is discharged, as above provided, the appeal bond, if one be filed, will have the same effect in discharging the boat as the bond above contemplated, and execution shall issue against the obligors therein, after judgment, in the same manner.

SEC. 14. Nothing herein contained is intended to affect the right of a plaintiff to sue in the same manner as though the provisions of this chapter had not been enacted.

SEC. 15. In actions, commenced in accordance with the provisions of this chapter it is sufficient to allege the contract to have been made with the boat itself.

SEC. 16. This act to take effect and be in force from and after the first day of June next.

Approved February 2, 1859.

On this record the plaintiff in error makes the following points;

I. This court will take judicial notice of the facts, that the

Missouri river is navigable from the sea at the port of Leavenworth, Kansas, by a vessel of ten tons burden or upwards. (Wheeling Bridge, 13, How, 561. Act of Congress of March 2, 1819, 3 U. S. Stats., 492; *Id.*, p. 685, § 2, Act of March 6, 1820; 3 *Id*, 546, Act of July 1, 1840, 13 *Id.*, 342.)

II. This court will take judicial notice of the statutes of Kansas, without their being specially pleaded. Owings v. Hull, 9, Pet, 607; Covington Drawbridge Co. vs. Shepherd, *et al.*, 20, How, 227: Jasper v. Porter v. McLean, 579: Miller vs. McQuerry 5 *id*, 469; March v. Com., 12 B. Mon, 28; Bridge, Proprietors v. Hoboken Co., 1 Wal., 142.)

III. Where the court has jurisdiction over the subject matter, the jurisdiction over the person may be waived by appearing and pleading to the merits. But jurisdiction over *the subject matter* never can be waived. Consent cannot confer jurisdiction when none exists by law. (Valarino v. Thompson, 3, Seld., 576; Lindell's adm'r, v. Hannibal and St. Jo. R. R. Co., 36 Mo.; Davis v. Packard, 7, Pet. 276; Dudley v. Mayhew, 3 N.Y. (3 Comst.) 9; Cohens v. Virginia, 6 Wheat, 394; Mannhardt v. Soderstrom 1 Bin., 142; Carlisle v. Weston, 21 Pick., 537; Ingalls v. Richardson, 3 Met. 340; Osgood v. Thurston, 23 Pick., 110.)

IV. The act of the Legislature of Kansas hereinbefore copied entitled "An act regulating actions against boats," is repugnant to the Constitution of the United States, and it is also repugnant to the laws of the United States. Consequently it is void. (The Hine vs. Trevor, 4 Wal., 555; The Moses Taylor, *id.* 411.)

V. The *jurisdiction* assumed by the District Court of Leavenworth County, Kansas, in this case, and all the proceedings which culminated in a judgment against the Plaintiff in Error for the sum of $15,286.70, was under and by virtue of said act. This suit lacks the leading characteristics of "a common law remedy" in this, viz.: There is no *personal* defendant; there is no summons for any *personal* defendant;

there is no appearance for or on behalf of any *personal* defendant; and there is no judgment against any *personal* defendant. The record shows the converse of all these characteristics to be the case. The Plaintiff in Error was made the defendant by *name* in the petition filed; she was notified by *name;* the Sheriff of Leavenworth County, Kansas, was commanded to seize her by *name*, her apparel, tackle, furniture, and appendages, and detain the same until released by due course of law; all the proceedings in court were conducted against her by *name;* and finally the judgment was rendered against her by *name*, and the same declared to be a *lien* upon her by *name*, her apparel, tackel, furniture and appendages; and it was further decreed that unless the defendant paid said judgment within ten days from the rendition thereof, an order should issue out of said court, direct to the sheriff of said county, commanding him to advertise and sell the said *Boat*, her apparel, tackle, fuaniture, and appendages in the manner provided by law for the sale of personal property on execution.

All these proceedings were in strict conformity with said act of the Legislature of Kansas. This suit was purely a proceeding under said act. The District Court of Leavenworth county, Kansas, proceeding according to the course of the common law, had no jurisdiction in this case only as conferred by this act.

VI. Was the *validity* of this act drawn in question in any way in the course of these proceedings within the provisions of the 25th section of the judiciary act? It is affirmed that it was. Let us ascertain how the validity of an act may be drawn in question as being contrary to the first clause of the 2d section of the 3d article of the Constitution of the United States, and also as being contrary to the 9th section of the judiciary act of 1789. Says Mr. Justice Miller in delivering the opinion of this court in the case of Bridge Proprietors vs. Hoboken Co., (1 Wal., on p. 142,) in which the same objection to the jurisdiction of this court was made as is made in this case, and the jurisdiction was sustained.

"It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the act invalid.

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: "This paragraph of the Constitution is the one involved in the case."

"Very few questions have been as often before this court as those which relate to the circumstances under which it will review the decision of the State courts; and the very objection now raised by defendants has more than once been considered and decided.

"In the case of *Crowell* v. *Randell*, *the motion to dismiss for want of jurisdiction was argued at much length by Mr. Webster, Mr. Sergeant and Mr. Clayton, whose names are a sufficient guarantee that the matter was well considered. The opinion was delivered by Mr. Justice Story. He reviews all the cases reported up to that time, and lays down these four propositions as necessary to bring a case within the 25th section of the Judiciary Act:

"'1st. That some one of the questions stated in that section did arise in the State court. 2d. That the question was decided by the State court, as required in the same section. 3d. That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised and must have been decided, in order to have induced the judgment. 4th. That it is not sufficient to show that the question might have arisen or been applicable to the case, unless it is further shown in the record that it did arise, and was applied by the State court to the case.'

*10 Peters, 368.

"In the case of *Armstrong* v. *The Treasurer of Athens County*,* Judge Catron, in delivering the opinion of the court, said that the question of jurisdiction, under the 25th section of the act of 1789, had so often arisen, and parties had been subject to so much unnecessary expense, that the court thought it a fit occasion to state the principles on which it acted in such cases. Referring especially to the manner in which the question on which the jurisdiction must rest shall be made to appear, he lays down six different modes in which that may be done. The first of these is 'either by express averment or by necessary intendment in the pleadings in the case.' The sixth is, 'that it must appear from the record that the question was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed, without deciding it.'"

1. Now it has already been shown that the petition filed by the defendants in error against the plaintiff in error, is framed strictly and literally on said act, although it is not referred to either by its title or the date of its approval, still this court will take judicial notice of said act as the one referred to in said petition. Is it not clear then that "by necessary intendment in the *pleadings* in the case,' that the *validity* of said act "was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed without deciding it?"

2. Was not the *validity* of said act drawn in question by the *agreed statement of facts* which was read in evidence by the defendants in error to support their cause of action, and which, by its terms, expressly submitted the controversy between the parties "to the District Court of Leavenworth county, for its decision and judgment?" This agreed statement of facts and submission were in conformity with section 507 of chap. 26, p. 212 of the Compiled Laws of Kansas, 1862. Did this agreed statement of facts not present to said court "for its decision and judgment" a contract of affreightment between the plaintiff in error and the defendants in error, which in the language of Justice Field, in delivering the opin-

* 16 Peters, 281.

ion of this court in the case of the Moses Taylor, (4 Wal., on p. 427,) "is clearly one within the admiralty and maratime jurisdiction of the Federal courts. * * There is no distinction in principle between a contract of this character [*i. e.*, a contract for the transportation of a passenger] and a contract for the transportation of merchandise. The same liability attached upon their execution both to the owner and the ship. The passage money in the one case is equivalent to the freight money in the other. A breach of either contract is the appropriate subject of admiralty jurisdiction."

This court will look into the record on an agreed statement of facts, and re-examine the questions presented by said agreed statement. (Burr vs. Des Moines Co., 1 *Wal.* 99; Pomeroy's Lessee vs. Bank of Indiana *id.* 592, Thompson vs. Riggs, 5 *id.* 675.)

3. Was not *validity* of said act drawn in question in the second reason assigned in the motion for a new trial by the following words: "Because the court found and rendered judgment for the plaintiff when it should have found and rendered judgment for the defendant?"

It is true that there are no words used in this reason which refer to said act, either by its title or the date of its approval. But, says Mr. Justice Miller in delivering the opinion of this court in the casee of Bridge Proprietors vs. Hoboken Co., (1 Wal., on p. 142,) quoting from the opinion of Mr. Justice Story in the case of Crowell vs. Randall, "that it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is sufficient if it appear, by clear *necessary intendment*, that the question must have been raised and must have been decided, in order to have induced the judgment."

4. Was not the *validity* of said act again drawn in question in the second and sixth assignment of errors in the Supreme Court of Kansas? They are in these words:

"2d. The court erred in finding and rendering a judg-

ment in favor of the plaintiffs when it should have rendered a judgment for the defendant.

"6th. The court erred in rendering a judgment in behalf of the plaintiff and decreeing said judgment a lien upon said steamboat Emilie her tackle, furniture, &c."

We can only ascertain from the record itself what was really passed upon by the District Court of Leavenworth county, and also by the Supreme Court of Kansas, as neither has stated any reasons on the record or filed any *opinion* showing the ground upon which the case was decided, although the latter court is expressly required by the statutes of the State to file such opinion. This very silence is ominous. It affords a fair presumption that the latter court was not willing to put *upon the record* the grounds of its decision and the reasons therefor. Is it not a fair inference from this *silence*, when the law required it to speak, that it had doubts as to its *jurisdiction* over the case?

Now it is affirmed that the validity of said act was drawn in question *first* by the pleadings; *second*, by the *agreed statement of facts offered* in evidence; *third*, by the second reason assigned in the motion for a new trial; *fourth*, the second and sixth assignment of errors filed in the Supreme Court of Kansas. (Craig vs. State of Missouri, 4 Pet., 40; Railroad Co. vs. Rook, 4 Wal., on p. 180; Minor vs. Tillotson, 2 How., 392.)

VII. The District Court of Leavenworth county, Kansas, had no jurisdiction over the *subject-matter* of this suit. (The Hine *vs.* Trevor, 4 Wal., 555; The Moses Taylor, *id.* 411.) The petition in this case was not merely in substance a *libel*; but it was so in form, using *the very words* that are used in the best and most approved form of a libel against a steamboat on a contract of affraightment, (2 ~~Curtis~~, Admiralty, 501.) So of the writ of seizure, (*id.* 555.) But, says the counsel for the defendants in error, there was a formal plea to the jurisdiction filed *in limine* in the case of The Hine, and also in the case of The Moses Taylor. That is

true. But in this case the want of jurisdiction over the *subject-matter* was apparent on the *face of the record.* The petition itself disclosed it, and where that is the case, it is a work of supererogation to file a formal plea to the jurisdiction. A demurrer might have been filed to the petition for that reason. But the failure to file a demurrer did not waive the objection. Consent cannot confer jurisdiction over the *subject-matter* where it does not exist by law; and whenever the fact becomes apparent, either in the court of original jurisdiction or in the appellate court, that the court has no jurisdiction *over the subject-matter*, it will arrest all further proceedings. It is immaterial when or how the fact becomes apparent. The only office, then, which the filing of a formal plea to the jurisdiction can perform, is to formally spread the fact upon the record, where it has not already been done by the petition or other pleading on the part of the plaintiff, that the court has no jurisdiction over *the subject matter* of the suit. There are many cases in which the defects in a declaration are ~~covered~~ cured by the defendant supplying the defects in his plea; and it answers every legal purpose just as well when the fact is alleged by the defendant in his plea as if it had been alleged by the plaintiff in his declaration. *Qui bono* allege a fact in a plea that is already alleged, *i. e.*, in the plaintiff's petition?

VIII. Under the 507th section of chapter 26, page 212 of the compiled laws of Kansas, the parties are authorized to submit the matters in controversy to the court without action. In pursuance of this section the parties made an *agreed statement of the facts and submitted* this case upon said agreed statement. By the next section this agreed statement and submission *constitute the* record in the case and may be reviewed by the Supreme Court, the same as the record in a regular suit, in which issue has been joined. This agreed statement and submission "appear on the face of the record," (§ 25 Judiciary Act, 1 vol. U. S. Stats., p. 86,) and this court is bound to take judicial notice of this practice au-

thorized by the statutes of Kansas. Now, as the want of jurisdiction over *the subject matter* of this controversy, "appears on the face of the record," there is enough then on the face of this record to show that the validity of the act of the Legislature of Kansas, hereinbefore recited, was drawn in question, on the ground that it is repugnant to the first clause of the 2nd section of the 3rd article of the Constitution of the United States, which extends the judicial power of the United States, "*to all cases of admiralty and maritime jurisdiction*;" and there is also enough on the face of this record to show that said act is repugnant to that part of the 9th section of the Judiciary Act which says that the District Courts of the United States "shall also have *exclusive* original cognizance of *all* civil causes of admiralty and maritime jurisdiction on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." (1 vol. U. S. Stats., 77; Story on Const., 2 vol. §§ 1761, 1765; Federalist, No. 81.)

This court may, *sua sponte*, dismiss for want of jurisdiction, although the objection is not raised by the pleadings, nor even suggested by counsel, (Parker v. Winnipiseogee Lake Cotton and Woolen Co., 2 *Black*, 550, and authorities there cited.) A Court of Error will take judicial notice of the authority and powers of the court from which error is brought, (1 Phil. Ev., 518,) and will reverse whenever the error is apparent on the face of the record, although the objection is not raised by any exception, or even taken by counsel in the Appellate Court. (Groland vs. Dawes, 4 How., 131, and authorities there cited; Bennett vs. Butterworth, 11 How., 669; Noyes vs. Butler, 6 Barb., 613, and authorities there cited.)

Does the want of jurisdiction over *the subject-matter* "appear on the face of the record" in this case? It is affirmed

that it does. If in no other way, it appears by the *agreed statement of facts*. What says the Supreme Court of Louisiana in the case of Bachemain vs. His Creditors, (2 Miller's La. R., 347,) in which there had been no appearance by the appellant in the lower court; but the judge who rendered the judgment *certified the facts*, and the Supreme Court reviewed the case on the facts thus certified, and reversed and remanded it:

"This is a *statement of facts*, and in such a case the case is before us examinable in every one of its points, without exception."

If the judgment in that case was reviewed by the Supreme Court, and reversed on the statement of facts, certified by the judge who rendered the judgment, *a fortiori*, the judgment in this case, where there is an *agreed* statement of facts, constituting the record, ought to be re-examined by this court and reversed for want of jurisdiction over the *subject-matter*.

JAMES CARR,
Of Counsel for Plaintiff in Error.

35 *Certificate of clerk of District Court.*

STATE OF KANSAS, *County of Leavenworth, ss:*

I, John E. Blaine, clerk of the District Court of the first judicial district of the State of Kansas, sitting in and for the county of Leavenworth, do hereby certify that the above and foregoing transcript is a true, full and correct copy of all the papers, pleadings and orders of said court in the above-entitled cause, as well as the endorsements thereon, as the same remains now on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Leavenworth, this 29th day of November, A. D. 1864.

[SEAL.] JOHN E. BLAINE, *Clerk*,
By J. E. ARNOLD, *D. C.*

[5-c. rev. stamp cancelled.]

36 And afterwards, to wit, at a regular term of the said Supreme Court of the State of Kansas, begun and held at the city of Topeka, commencing on the 3d day of January, A. D. 1865, present the Hon. Robert Crozier, chief justice; Hon. S. A. Kingman and Hon. L. D. Bailey, associate justices; Andrew Stark, clerk, and William R. Brown, crier. And on Wednesday, the 11th day of January, 1865, the following among other proceedings were had, to wit:

THE STEAMBOAT EMILIE
vs.
CARNEY & STEVENS.

This cause being called for hearing, was argued by Messrs. Pendery & Carr for the plaintiffs in error, and by Messrs. Fenlon & Campbell for the defendants, and taken under advisement by the court.

ROBERT CROZIER, *C. J.*

And afterward, to wit, at the term aforesaid of said court, begun and held at the city of Topeka, as aforesaid, and continued on the 17th day of January, 1865, the following among other proceedings were had, to wit:

Judgment affirmed by Supreme Court.

THE STEAMBOAT EMILIE
vs.
CARNEY & STEVENS.

This cause came on to be heard upon the petition in error and transcript of the judgment and proceedings of the District Court, sitting in and for the county of Leavenworth, and was argued by counsel, on consideration whereof it is ordered by the court here that the judgment of said District Court be and the same is hereby

affirmed; and it is further considered and adjudged that the said plaintiff, the steamboat Emilie, pay the costs of th iscourt and that execution issue therefor.

ROBERT CROZIER, *C. J.*

37 And afterwards, to wit, on the 22nd day of July, A.D. 1868, there was on behalf of said plaintiff in error filed in the office of the clerk of said Supreme Court of the State of Kansas a bond for a writ of error from the Supreme Court of the United States to said Supreme Court of the State of Kansas in said cause, which said bond is in words and figures as follows, to wit:

38 *Bond for costs.*

Know all men by these presents, that we, John L. Lathrop, Charles W. Mead and James Carr, are held and firmly bound unto Thomas Carney and Thomas C. Stevens, partners, as Carney & Stevens, in the sum of five hundred dollars, to be paid to the said Thomas Carney and Thomas C. Stevens, partners as aforesaid, their executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators firmly by these presents. Sealed with our seals, and dated this 30th day of June, A. D. 1868.

Whereas lately, at the January term, A. D. 1865, of the Supreme Court of the State of Kansas, held at Topeka, in a suit depending in said court between the steamboat Emilie, plaintiff in error, and Thomas Carney and Thomas C. Stevens, partners as Carney & Stevens, defendants in error, on a petition in error to the Dist. Court of Leavenworth county, in said State, judgment was rendered against the steamboat Emilie, plaintiff in error as aforesaid, and the

39 said steamboat Emilie, having obtained a writ of error from the clerk of the Circuit Court of the United States for the district of Kansas to reverse the said cause to the Supreme Court of the United States to reverse the judgment rendered in the aforesaid suit by the said Supreme Court of the State of Kansas:

Now, therefore, the condition of this obligation is such that if the above-named steambeat Emilie, plaintiff in error as aforesaid, shall prosecute its said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and subscribed in the presence—

[SEAL.] JOHN L. LATHROP.
[SEAL.] CHARLES W. MEAD.
[SEAL.] JAMES CARR.

Approved by—

SAMUEL MILLER, *Judge.*

40 *Certificate of the clerk of the Supreme Court.*

STATE OF KANSAS, *sct:*

I, E. B. Fowler, clerk of the Supreme Court of the State of Kansas, do hereby certify that the foregoing is a full, true and complete copy of the record, proceedings, judgment and all things concerning the same had in said court in the cause therein mentioned, as they remain of record and on file in the office of the clerk of said court. I further certify that there never has been any opinion of said Supreme Court filed in said case. And further certify that the original bond for a writ of error in said case, and also a copy of the annexed writ of error, were duly deposited and filed in the office of the clerk of said court on the 22nd day of July, A. D. 1868.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at office in Topeka, this 21st day of August, A. D. 1868.

[SEAL.] E. B. FOWLER, *Clerk.*

41 The cost of making this transcript is $18,50, paid by James Carr, per plaintiff in error.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the Supreme Court of the State of Kansas, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said Supreme Court of the State of Kansas, before you, between the steamboat Emilie, plaintiff in error, and Thomas Carney and Thomas C. Stevens, partners, as Carney & Stevens, defendants in error, on a petition in error to the District Court of Leanvenworth county, in said State, said Supreme Court being the highest court of law in said State in which a decision could be had in said suit, a manifest error hath happened to the great damage of the said steamboat Emiline, plaintiff in error in said Supreme Court, as aforesaid, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

42 Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 20th day of June, A. D. 1868.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed by—

SAM. F. MILLER,
Judge, S. C. U. S.

Endorsed: The steamboat Emilie, plaintiff in error vs. Thomas Carney and Thomas C. Stevens, partners, as Carney & Stevens, defendants in error. Writ of error.

43 Supreme Court.

Clerk's return to writ of error.

STATE OF KANSAS:

In obedience to the command contained in the within writ, I, E. B. Fowler, clerk of the Supreme Court of the State of Kansas, herewith forward to the Supreme Court of the United States, held at Washington, a full, true and complete transcript of the record and proceedings in the case of steamboat Emilie, plaintiff in error, against Thomas Carney and Thomas C. Stevens, partners as Carney & Stevens, defendants in error, as fully as the same remain of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court. Done at my office, in Topeka, in said State, this 21st day of August, A. D. 1868.

[SEAL.] E. B. FOWLER, *Clerk.*

44 STATE OF KANSAS, *Leavenworth County, sct*:

This day personally appeared before the undersigned, Henry Carey, clerk of the District Court in and for said county and State, within and for the county and State aforesaid, George W. Nelles, who being by me first duly sworn for that purpose, deposes and says, that he served the within citation on the within-named Thomas Carney by delivering a true copy thereof to him in person; and on the within-named Thomas C. Stevens, by leaving a true copy thereof at the usual place of abode of said Stevens, with a white member of his family over the age of 21 years, viz., his wife; and also on Thomas P. Fenlon, the attorney of record for the said Carney and Stevens in the suit therein named, by delivering a true copy thereof to him in person, showing to the said parties respectively, at the time of delivery herein stated, the within citation. W. P. Gambell, the other attorney of record for said parties, being dead.

All done in the city of Leavenworth, in the county of Leavenworth, and State of Kansas, on the 8th day of August, A. D. 1868.

GEORGE W. NELLES.

Subscribed and sworn to this 8th day of August, A. D. 1868. In testimony whereof I have hereunto subscribed my name and affixed the seal of the court aforesaid.

[SEAL.] HENRY CAREY,
Clerk of said Court.

45 UNITED STATES OF AMERICA, *ss*:

To Thomas Carney and Thomas C. Stevens, partners, as Carney & Stevens, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 1st Monday in December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the United States, wherein the steamboat Emilie is plaintiff, and you are defendant in error, to show cause if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, justice of the said Supreme Court of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and sixty-eight.

SAM. F. MILLER, *Judge.*

Endorsed: No. 291. The Steamboat Emilie vs. Thomas Carney & Thomas C. Stevens. Citation and affidavit of service. Filed 5th Dec'r, '68.

46 Supreme Court of the United States in error to the Supreme Court of the State of Kansas.

THE STEAMBOAT EMILIE, plaintiff in error, *vs.* THOMAS CARNEY AND THOMAS C. Stevens, partners as Carney & Stevens, defendants in error.	Of December term A. D. 1868.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the City of Washington, comes the said steamboat Emilie by Sidney Bartlett, her attorney, and says, that in the record and proceedings aforesaid there is manifest error, in this:

1. That the District Court sitting in and for Leavenworth county, Kansas, had no jurisdiction over the plaintiff in error.
2. That said court had no jurisdiction over the subject of said case.
3. That the Supreme Court of said State had no jurisdiction over the plaintiff in error.
4. That said Supreme Court had no jurisdiction over the subject matter of said cause.
5. That the act of the legislature of said State entitled "An

47 act regulating actions against boats," approved February 2nd, 1859, upon which the jurisdiction, proceedings, and judgment in said case were based, is repugnant to the Constitution of the United States.

6. That said act is repugnant to the laws of the United States.

7. That by the record aforesaid it appears that the judgment aforesaid was given for the defendant in error; whereas by the law of the land the said judgment ought to have been given for the plaintiff in error against the defendant in error; and the said steamboat Emilie, plaintiff in error as aforesaid, prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that she may be restored to all things which she hath lost by occasion of the said judgment.

SIDNEY BARTLETT,
With whom is JAMES CARR,
Attorney for Plaintiff in Error.

Endorsed: No. 291. The Steamboat Emilie vs. Thomas Carney & Thomas C. Stevens. Assignment of errors. Filed 5th Dec'r, '68.